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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

DOCKET NO. 71-756

JOSEPH BIANCONE, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINION BELOW

The only opinion below is that of the Third Circuit and as yet it is unreported. The entire opinion (in excess of fifty pages) is printed as an appendix in the Petition for Certiorari filed in this Court by a co-defendant Hugh Addonizio and is adopted herein by reference.

STATEMENT OF JURISDICTION

On September 22, 1970 the U.S. District Court for New Jersey entered a Judgment of Conviction. The United States Court of Appeals for the Third Circuit denied an application for rehearing or in the alternative for rehearing en banc by an order dated November 9, 1971. On November 18, 1971 the Third Circuit entered an order staying the mandate conditioned on the fact that Petitioner Biancone file a petition for certiorari on or before December 9, 1971. (App. p. 1).

The statute conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. 1254.

QUESTION PRESENTED FOR REVIEW

Did the Trial judge commit reversible error when he refused to charge the jury on the distinction between bribery and extortion?

STATEMENT OF CASE

1. Appellant and fourteen co-defendants were originally charged with one count of conspiracy and 65 counts alleging substantive acts in furtherance of said conspiracy. Following a trial before the Hon. George H. Barlow and a jury the appellant and four other co-defendants were convicted of one count of conspiracy in violation of 18 U.S.C. 371 and 63 counts charging substantive acts of extortion in violation of 18 U.S.C. 1951. On September 22, 1970, appellant was sentenced to 10 years in prison and fined $25,000.

Appellant's appeal from this conviction was noted and on February 18 and 19, 1971, oral argument was

held before this court. On September 16, 1971, this court affirmed appellant's conviction.

An application for rehearing by the original panel or in the alternative for rehearing en banc was denied by order of this court entered November 9, 1971.

STATUTE INVOLVED

18 U.S.C.A., Section 1951, the Hobbs Act, (Interference with commerce by threats of violence), provides, in part:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section— * * *
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> "(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the States has jurisdiction."

REASONS WHY CERTIORARI SHOULD BE GRANTED

ARGUMENT

Defendants submitted written requests to charge the jury to the following effect: that bribery and extortion are distinct and mutually exclusive crimes; that bribery amounted to the voluntary payment of money; that extortion amounted to a coerced payment of money; that a conviction of the defendant would have to be grounded upon a belief, beyond reasonable doubt, that they had committed extortion (as opposed to bribery); and that a finding that defendants had accepted bribes would not justify a conviction (R532a, 541a to 542a). Although counsel strenuously urged the trial judge to instruct the jury on the distinction between bribery and extortion (R3575a to 5380a, 5705a to 5706a), he refused to do so (R5396a).

The trial judge charged the jury on the elements of extortion, adding the statement that: "The mere voluntary payments of money unaccompanied by any any (sic) economic loss, would not constitute extortion * * * (R5747a to 5749a). However, he did not mention the word bribery, or that bribery and extortion were mutually exclusive crimes, or that a finding that defendants had taken bribes would not justify a conviction. At the conclusion of his charge, defendants took exception to the above-quoted aspects of his instructions (R5782a to 5783a, 5790a).

The court below found that above point as a refusal to charge to be without merit, without discussion. (Opinion, appended hereto, page 5a, lines 24 to 27.)

"(T)he respondents in a criminal case, no less than the parties in a civil case, are entitled of right to have clearly stated to the jury each distinct and important

theory of defense, so that the jury may understand that theory and the essential rules applicable to it." *Hendrey* v. *United States,* 233 F. 5, 18 (6th Cir. 1916). "Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory. *Bird* v. *United States,* 180 U.S. 356, 361 * * *." *Calderon* v. *United States,* 279 F. 556, 558 (5th Cir. 1922). "While some reliance may be placed by a trial judge upon the capacity of a jury to understand the implications of instructions, nevertheless both of the parties to the cause are entitled to have the jury clearly informed on the whole of the instructions as to the law covering their respective theories of the case, there being evidence to support each theory." *McAffee* v. *United States,* 105 F. 2d 21, 26 (App. D.C. 1939).

A defendant is not precluded "to an instruction embodying a theory merely because it is predicated upon proof adduced by the government . . . ." *United States* v. *Phillips,* 217 F.2d 435 (7th Cir. 1955). And in *United States* v. *Clancy,* 276 F.2d 617, 636 (7th Cir. 1960), reversed on another ground, 365 U.S. 312 (1961), the Seventh Circuit says:

"True, defendants were entitled to instructions on their theory of the case for which there was any foundation in the evidence, even though they did not present any testimony.

CONCLUSION

Petitioner Biancone requests that all points raised insofar as they may be applicable by co-defendants below and petitioners now in this court, Anthony

La Morte, Hugh Addonizio, Phillip Gordon and Ralph Vicaro be considered as to him.

It is therefore respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

THOMAS R. DYSON, JR.
Attorney for Petitioner

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,391
No. 19,392
No. 19,393

UNITED STATES OF AMERICA

v.

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER

HUGH J. ADDONIZIO, Appellant in No. 19,391

ANTHONY P. LA MORTE, Appellant in No. 19,392

JOSEPH BIANCONE, Appellant in No. 19,393

(D. C. Criminal No. 548-69)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 9, 1971, and it is further ordered that the mandate in this case will not thereafter be further stayed unless there is filed with the clerk of this court prior to the expiration of the aforesaid stay of mandate notice that petition for writ of certiorari has been filed in the Supreme Court of the United States as provided in Rule 41, Federal Rules of Appellate Procedure.

MAX ROSENN
Judge

Dated: November 18, 1971